STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of CASEY RYAN WILLIAMS,
Minor.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

ASHLEY SHARPE,

Respondent-Appellant,

and

JONATHAN WILLIAMS,

Respondent.

UNPUBLISHED
November 15, 2007

No. 277589
Ogemaw Circuit Court
Family Division
LC No. 06-013236-NA

Before: Talbot, P.J., and Fitzgerald and Kelly, JJ.

PER CURIAM.

Respondent-appellant appeals as of right from the trial court's order terminating her parental rights to the child under MCL 712A.19b(3)(b)(*ii*), (g), and (j). We affirm.

The child at issue in this case was removed from respondent-appellant's care after his older brother, Calub, suffered serious injury at the hands of her abusive boyfriend, which tragically resulted in his death. Shortly thereafter, petitioner sought termination of respondent-appellant's parental rights at the initial disposition, primarily alleging a failure to protect her children. A jury subsequently found that the evidence supported statutory grounds to assume jurisdiction over the child, and later the trial court found that clear and convincing evidence supported grounds for termination of respondent-appellant's parental rights. The child was placed in the custody of his father.

Respondent-appellant first claims that petitioner failed to establish the statutory grounds for termination because the evidence failed to clearly establish that the child would likely be subjected to future harm or injury if returned to her care. We disagree. In order to terminate parental rights, the trial court must find that at least one of the statutory grounds for termination in MCL 712A.19b(3) has been met by clear and convincing evidence. *In re Jackson*, 199 Mich

App 22, 25; 501 NW2d 182 (1993), citing *In re McIntyre*, 192 Mich App 47, 50; 480 NW2d 293 (1991). "Once a ground for termination is established, the court must issue an order terminating parental rights unless there exists clear evidence, on the whole record, that termination is not in the child's best interests." *In re Trejo*, 462 Mich 341, 354; 612 NW2d 407 (2000); MCL 712A.19b(5). We review the trial court's determination for clear error. *Trejo, supra* at 356-357.

Under the circumstances of this case, we are not left with a definite and firm conviction that the court made a mistake in terminating respondent-appellant's parental rights. *In re JK*, 468 Mich 202, 209-210; 661 NW2d 216 (2003). It is evident that respondent-appellant clearly knew or should have known that her boyfriend had a propensity for violence and was capable of physical abuse because he had repeatedly struck her while she was pregnant and she was aware of his short temper. Despite her knowledge of his violent tendencies, respondent-appellant never reported the abuse to the police or her family or removed her children from the situation. On the contrary, she continually allowed him to care for her children, believing that her boyfriend would never harm them and that he did not pose a danger to their environment. The children had also suffered injuries/bruising while in his care, including a broken arm, a burned hand, and facial bruising, which she believed were accidental based on her boyfriend's explanations. Although testimony arguably supported respondent-appellant's belief, the multiple injuries should have, at a minimum, given her heightened concern for the welfare of her children, especially considering that her boyfriend was abusive and violent to her. Instead, she repeatedly denied that he would ever abuse or hurt the children. These facts clearly established that respondent-appellant, having the opportunity to do so, failed to protect Calub from a man whom she knew had violent tendencies and was capable of physical abuse. MCL 712A.19b(3)(b)(*ii*).

Although by the time of the permanent custody hearing her boyfriend was no longer a threat to the child's welfare as he was apparently incarcerated for Calub's murder, respondent-appellant's serious past failure to protect her children, considered with testimony indicating that she failed to recognize that her actions placed her children in a potentially harmful environment, showed a serious lack of insight, awareness, or judgment necessary to protect a child from harm. Notably, at the time of the permanent custody hearing, despite her participation in counseling and the benefit of hindsight, she continued to deny that her boyfriend ever abused or harmed her children before Calub's death and felt that she did not have the opportunity to prevent Calub's injury. On these facts, it was reasonable to conclude that respondent-appellant would likely place the child in danger again if he were returned to her care. Accordingly, we find no clear error in the trial court's determination that a reasonable likelihood exists that the child would suffer injury or abuse in the foreseeable future if returned to her care. MCL 712A.19b(3)(b)(*ii*). *Trejo, supra* at 356-357.

We also find that termination was appropriate under sections (3)(g) and (j). Respondent-appellant clearly failed to provide proper care and custody for her children in the past by failing to protect them from her boyfriend's physical abuse and failing to provide appropriate care for the child. MCL 712A.19b(3)(g). The same evidence indicating that she would not likely be able to protect the child from injury or abuse in the future, equally indicates that there is no reasonable expectation that she would be able to provide proper care or custody for the child within a reasonable time considering his tender age. MCL 712A.19b(3)(g). Given the foregoing, the evidence also clearly established a reasonable likelihood that the child would be harmed if returned to respondent-appellant's home. MCL 712A.19b(3)(j).

We also reject respondent-appellant's claim that the trial court clearly erred in its best interests determination. The child was subjected to trauma while in his mother's care due to the death of his older brother at the hands of her abusive boyfriend. Upon the child's removal from her care, his fingernails and toenails were discolored and cracking, he was thin, and a doctor had not attended to the burn on his hand. Testimony revealed that since the child had been in his father's care, his physical health had improved, he was developing normally, he appeared happy, and he had developed a strong bond with his father. Given the child's apparent progress since the removal from respondent-appellant's care and his need for ongoing stability and permanency, we cannot find that the trial court clearly erred in concluding that the evidence failed to establish that termination was contrary to his best interests. *Trejo, supra* at 354, 356-357; MCL 712A.19b(5).

We find no merit to respondent-appellant's claim that the trial court erred in failing to consider the sibling bond between the child and respondent-appellant's youngest child, who was in her custody. The record lacked any indication that the child had ever met his sibling, who was born approximately six months after the child's removal from respondent-appellant's care, that the child was aware of his sibling's existence, or that he had any bond whatsoever with him. Under these circumstances, we fail to find that the trial court clearly erred by not considering the sibling bond in its best interest analysis. *Trejo, supra* at 356-357.

Respondent-appellant also raises several claims of ineffective assistance of counsel. We review this issue by applying the test for ineffective assistance of counsel in criminal matters. *In re Rogers*, 160 Mich App 500, 502; 409 NW2d 486 (1987). For this Court to reverse based on ineffective assistance of counsel, respondent-appellant "must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced [her] as to deprive [her] of a fair trial." *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994); *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). Respondent-appellant must overcome the presumption that the challenged action might be considered sound trial strategy and must show that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Sabin, supra* at 658-659; *People v Noble*, 238 Mich App 647, 661-662; 608 NW2d 123 (2000).

Respondent-appellant's primary argument of ineffectiveness is that her counsel failed to call the medical examiner, who performed an autopsy on Calub, as a witness at the adjudicative jury trial or the permanent custody hearing. Respondent-appellant, for the first time on appeal, claims that if he had been called he would have testified that the extensive bruising found on Calub's body occurred within 24 hours of his death. Respondent-appellant contends that such testimony bolstered her own testimony that she did not observe any bruising other than normal boyhood bruising on Calub before his death and supported her defense that she could not have reasonably been aware that her boyfriend posed a threat of harm to her children. As factual support for her claim, respondent-appellant attached to her brief on appeal a copy of the medical examiner's testimony provided at the preliminary examination in the criminal proceedings against her boyfriend to show that his testimony would have been favorable to her. However, because respondent-appellant's claim of ineffective assistance was not preceded by an evidentiary hearing or a motion for new trial before the trial court, our review is limited to mistakes apparent on the record. *Sabin, supra* at 658-659; *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997). Because the medical examiner's testimony was not part of the

lower court record, we cannot consider it to resolve this issue on appeal and our review of this claim of ineffectiveness is effectively foreclosed. *People v Shively*, 230 Mich App 626, 629 n 1; 584 NW2d 740 (1998), citing *People v Barclay*, 208 Mich 670, 672; 528 NW2d 842 (1995).

We note, however, in light of the facts clearly supporting a finding that respondent-appellant failed to protect her children from violence, there is no reasonable probability that the outcome of the adjudicative jury trial or the trial court's ultimate decision to terminate her parental rights would have been different with the benefit of the proposed testimony. *Sabin, supra* at 660. Furthermore, counsel's failure to call a witness is presumed to be a matter of trial strategy. *People v Avant*, 235 Mich App 499, 508; 597 NW2d 864 (1999). Given that the medical examiner's testimony would likely have described Calub's extensive injuries and manner of death in graphic detail, it was just as reasonable that her counsel decided not to call him because such testimony would likely be unfavorable and highly prejudicial to her.

Respondent-appellant's additional claims of ineffective assistance also fail. Respondent-appellant argues that her counsel was deficient in failing to call the doctor who concluded that the child's broken arm was accidental to support her defense that she could not have reasonably been aware that her boyfriend posed a threat of harm to the children. She also argues that her counsel should have called the doctor from whom she sought advice for the burn on the child's hand and persons from the "WIC" office who observed the child's hand to show that she sought medical treatment for his burns. However, these facts were elicited through other witnesses' testimony. Accordingly, although the proposed testimony by the doctors and/or workers may have bolstered the testimony already before the court, considering its cumulative nature and the clear evidence supporting the finding that respondent-appellant failed to reasonably protect her children, we cannot find that a reasonable probability exists that the additional testimony would have changed the outcome of the trial. *Sabin, supra* at 660.

Respondent-appellant next argues that her counsel was deficient in failing to call any witnesses at the permanent custody hearing to testify regarding her progress with services since the child's removal from her care. Although respondent-appellant speculates that service providers would have provided testimony favorable to her, she failed to produce any factual support for her claim, and thus, this claim of ineffectiveness fails. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999) (The burden is on the respondent to produce factual support for a claim of ineffective assistance of counsel).

Respondent-appellant's final claim is that termination was improper because she was not afforded an opportunity to work toward reunification with the child through participation in a case service plan. However, services are not required in all situations, *In re Terry*, 240 Mich App 14, 26 n 4; 610 NW2d 563 (2000), and where, as in this case, the petitioner requests termination in the initial petition there is no need to develop and consider a case service plan or to provide services toward reunification because the permanency plan is termination, not reunification. The filing of the termination petition was appropriate because respondent-appellant was suspected of placing her children at an unreasonable risk of harm by failing to intervene and eliminate the risk. See MCL 722.638(2). Therefore, petitioner's decision not to provide services in this case was justified. *Terry, supra* at 26 n 4. Further, respondent-appellant's argument that the court never considered whether reasonable efforts were necessary

is without merit. Our review of the record shows that the court, in a previous order, found that "reasonable efforts do not have to be made due to severity of risk from severe physical abuse."

Affirmed.

/s/ Michael J. Talbot
/s/ E. Thomas Fitzgerald
/s/ Kirsten Frank Kelly